



OFFICE of the ATTORNEY GENERAL  
GREG ABBOTT

March 31, 2003

Mr. Steven D. Monté  
Assistant City Attorney  
City of Dallas  
2014 Main Room 501  
Dallas, Texas 75201

OR2003-2178

Dear Mr. Monté:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 178563.

The Dallas Police Department (the "department") received a request for fifteen categories of information pertaining to the arrest of a specified individual. You claim that the requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.101, 552.103, 552.108, 552.117, 552.119, and 552.130 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we note that section 552.301(e) of the Government Code requires in pertinent part that a governmental body that requests an attorney general decision under section 552.301(a) must submit to the attorney general, within a reasonable time, but not later than the fifteenth business day after the date of receiving the request, written comments stating the reasons why any stated exceptions apply that would allow any portion of the requested information to be withheld from disclosure and a copy of the specific information requested, or representative samples of it if a voluminous amount of the information was requested, labeled to indicate which exceptions apply to which parts of the copy. *See* Gov't Code § 552.301(e). To date, the department has not submitted to us for our review any such written comments. Furthermore, we note that the department has submitted only a limited amount of information responsive to some of the request items and has provided no responsive information for other request items. You do not indicate that the submitted information constitutes a representative sample of the requested information. Therefore, we find that the department failed to request a decision from our office in accordance with section 552.301 of the Government Code.

Because the department failed to comply with the procedural requirements of section 552.301, all of the requested information is now presumed public. *See* Gov't Code § 552.302; *see also* *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The department must demonstrate a compelling interest in order to overcome the presumption that the information is now public. *See id.* Normally, a compelling interest is demonstrated when some other source of law makes the requested information confidential or when third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Although the department claims that the requested information is excepted from disclosure pursuant to section 552.103 of the Government Code, we note that this particular exception is a discretionary exception to disclosure under the Public Information Act that does not constitute a compelling interest sufficient to overcome the presumption that the requested information is now public.<sup>1</sup> Furthermore, the department has not demonstrated a compelling interest under section 552.108 that would allow the requested information to be withheld from disclosure. *But see* Open Records Decision No. 586 (1991) (need of another governmental body to withhold requested information may provide compelling reason for nondisclosure under statutory predecessor to section 552.108 in certain circumstances). Accordingly, we conclude that the department may not withhold any portion of the requested information under sections 552.103 or 552.108 of the Government Code.

Additionally, because the department did not submit for our review copies of any information that is responsive to some of the request items and only a limited amount of information with respect to the remaining request items, we have no basis for concluding that any information that has not been submitted to us for review is excepted from disclosure under sections 552.101, 552.117, 552.119, or 552.130 of the Government Code or is otherwise confidential by law. Accordingly, to the extent that the department maintains information that is responsive to the request and that has not been submitted for our review, we conclude that the department must release such information to the requestor. However, we caution the department that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. *See* Gov't Code § 552.352. Prior to releasing this information, the department should ensure that it does not contain any such confidential information. If the department believes that any portion of such information is indeed confidential and may not lawfully be released, the department must challenge this ruling in

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<sup>1</sup> Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general); *see also* *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.--Dallas 1999, no pet.) (governmental body may waive section 552.103). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

court as outlined below. We now address your section 552.101, 552.117, 552.119, and 552.130 claims with regard to the submitted information.

We note that the submitted information includes medical records that are subject to the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. The MPA provides that "a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter." Occupations Code § 159.002(b). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982)*. Medical records must be released upon the governmental body's receipt of the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See Occ. Code §§ 159.004, .005*. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. *See Open Records Decision No. 565 at 7 (1990)*. Accordingly, we conclude that the medical records that we have marked may only be disclosed in accordance with the access provisions of the MPA. *See Occ. Code §§ 159.002, .004; see also Open Records Decision Nos. 598 (1991), 546 (1990)* (because hospital treatment is routinely conducted under supervision of physicians, documents relating to diagnosis and treatment during hospital stay would constitute protected MPA records). Absent the applicability of an MPA access provision, we conclude that the department must withhold these records pursuant to the MPA.

Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See Gov't Code § 552.101*. Section 552.101 encompasses information that is protected from disclosure pursuant to the common-law right to privacy. Information is protected from disclosure under the common-law right of privacy when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert denied*, 430 U.S. 931 (1977); *see also Open Records Decision No. 611 at 1 (1992)*. Prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983)*. For example, a public employee's allocation of his salary to a voluntary investment program or to optional insurance coverage that is offered by his employer is a personal investment decision and information about it is excepted from disclosure under the common-law right of privacy. *See Open Records Decision Nos. 600 (1992)* (finding designation of beneficiary of employee's retirement benefits, direct deposit authorization, and forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care related to personal financial decisions), 545 (1990) (finding information relating to deferred compensation plan,

individual's mortgage payments, assets, bills, and credit history excepted from disclosure under common-law privacy), 523 (1989). However, information revealing that an employee participates in a group insurance plan funded partly or wholly by the governmental body is not excepted from disclosure. *See* Open Records Decision No. 600 at 10 (1992). We have marked some personal financial information within the submitted information which is protected from disclosure under the common-law right to privacy. Accordingly, we conclude that the department must withhold this information pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy.

You claim that portions of the requested information are excepted from disclosure pursuant to section 552.117 of the Government Code. Section 552.117(2) excepts from disclosure a peace officer's home address, home telephone number, social security number, and information indicating whether the peace officer has family members, regardless of whether the peace officer made an election under section 552.024 of the Government Code. *See* Gov't Code § 552.117(2). Section 552.117(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, we conclude that the department must withhold the portions of the submitted information, which we have marked, pursuant to section 552.117(2) of the Government Code. *See* Open Records Decision No. 670 at 5-6 (2001) (governmental body "may withhold home addresses and home telephone numbers of peace officers, in addition to social security numbers and information that reveals whether the peace officer or security officer has family members, without the necessity of requesting an Attorney General decision as to whether the exception under section 552.117(2) applies").

You also claim that some of the requested information is excepted from disclosure pursuant to section 552.119 of the Government Code. Section 552.119 excepts from disclosure a photograph of a peace officer that, if released, would endanger the life or physical safety of the officer unless one of three exceptions applies. The three exceptions are: (1) the officer is under indictment or charged with an offense by information; (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or (3) the photograph is introduced as evidence in a judicial proceeding. *See* Gov't Code § 552.119(a). This section also provides that a photograph exempt from disclosure under this section may be made public only if the peace officer gives written consent to the disclosure. *See* Open Records Decision No. 502 (1988). After carefully reviewing the submitted information, we find that no portion of this information constitutes a photograph of a peace officer. Accordingly, we conclude that the department may not withhold any portion of the submitted information under section 552.119 of the Government Code.

Finally, you claim that some of the requested information is excepted from disclosure pursuant to section 552.130 of the Government Code. Section 552.130 excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130. Accordingly, we conclude that the department must withhold the Texas motor vehicle information that we have marked within the submitted information pursuant to section 552.130 of the Government Code.

In summary, to the extent that the department maintains information that is responsive to the request and that has not been submitted for our review, the department must release such information to the requestor. With regard to the submitted information, the department must withhold the medical records that we have marked pursuant to the MPA, absent the applicability of an MPA access provision. The department must withhold the personal financial information that we have marked pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy. The department must withhold the information that we have marked pursuant to section 552.117(2) of the Government Code. The department must withhold the Texas motor vehicle information that we have marked pursuant to section 552.130 of the Government Code. The department must release the remaining submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/lmt

Ref: ID# 178563

Enc. Marked documents

c: Mr. Christopher J. Ewert  
Ewert Law Firm  
613 Shelley Park Plaza  
Tyler, Texas 75701  
(w/o enclosures)